IN THE HIGH COURT OF BOMBAY AT GOA

WRIT PETITION NO. 622 OF 2006

SHRI. VINAY M. PRABHU VERLEKAR ....Petitioner

Versus

SHRI. NISHITH M. PRABHU VERLEKAR AND 2 ORS. ....Respondents

Mr. Sudin Usgaonkar, Advocate for the Petitioner.

Mr. M.S. Joshi, Advocate for R.2 and 3.

Coram:- S.K. SHAH, J.

Date:- 10th January, 2007

P.C.:

None for the Respondent No.1.

2. Heard the learned Counsel for the petitioner as also the learned Counsel for the Respondents No.2 and 3.

3. The contesting respondent is the respondent No.1 who has been properly served with a notice as directed by this Court on 21st December, 2006 wherein it was made clear that the petition would be disposed of at the stage of admission itself. However, no one has appeared for the respondent No.1. Therefore the Writ Petition is taken up for hearing and final disposal.

4. The stage of the suit is for defendant no.2's evidence to be recorded. The evidence on the side of the plaintiff is over. Defendant No.1 is examined and his evidence is also over. The affidavit of examination-in-chief of defendant no.2 is already filed in the suit. Before the cross-examination of defendant no.2 began the defendant no.2 filed an

application before the Court requesting the Court to allow defendant No.2 to put in additional affidavit by way of examination-in-chief. It appears that number of other applications had been placed on record for consideration of the trial Court. All those applications were considered by the trial Court simultaneously and passed a common order on 21.03.2006. What is important to be noted is that the application made by defendant No.2 for allowing him to put in additional affidavit by way of examination-in-chief came to be rejected with the observation that there was no such provision in C.P.C. The said order was challenged before this Court by way of Writ Petition, being Writ Petition No.293/06. The said Writ Petition came to be disposed on 3rd August, 2006 with the following Order :-

" On the motion made by the learned Counsel appearing for the petitioner, he is allowed to withdraw this petition. It is needless to mention that if the petitioner decides to file another affidavit bringing in tune with the documents available on record, in that event, it would be open for the trial Court to consider as to whether or not the said affidavit should be taken on record, on its merits, after hearing the parties to the suit.

With these observations, the petition is dimissed as withdrawn, with no order as to costs. "

5. This order therefore made it clear that the application seeking leave to file additional affidavit by way of examination-in-chief shall have to be considered by the trial Court on merits and obviously not on its maintainability.

6. It appears that thereafter another application was made on behalf of the defendant No.2 seeking permission to file additional affidavit by way of examination-in-chief. That application again came to be rejected by the trial Court by the impugned Order dated 30.11.06. The relevant observations of the learned trial Judge while rejecting this application was that there is no change in circumstances subsequent to the earlier Order

dated 21.3.2006 and further specifically observing that such application will cause great prejudice to the plaintiff and that there has been considerable delay in recording the evidence of defendant No.2. What is pertinent to note is that the application made by the defendant No.2 seeking leave to file additional affidavit by way of examination-in-chief was not considered on merits at all. By a direction to consider the application on merits, would mean whether the evidence which is incorporated in the additional affidavit is relevant or otherwise and nothing more. There was also no question of causing prejudice to the other side as the cross-examination of defendant No.2 by the other parties had not been commenced at all. It was open for the other party to put whatever questions they wanted to in defence in the cross-examination of defendant No.2. It is most unfortunate that while the learned trial Judge observed that the case was of 1982, failed to consider the aspect "on its merits" as directed by this Court. In fact, there is no specific provision in the C.P.C. debarring a party to file additional affidavit by way of examination-in-chief so long as the cross-examination of that witness has not begun. The only thing which is required to be considered is whether the facts incorporated in such affidavit are relevant to the issues to be decided between the parties.

7. The learned counsel for the petitioner specifically states that what is incorporated in the additional affidavit by way of examination-in-chief is only relevant to the documents produced by the plaintiff and clarifying those documents and nothing more.

Under the circumstances, the Writ Petition is allowed in terms of prayer clauses (a), (b) and (c). No order as to costs.

Parties to act on copy of this Order duly authenticated by the Associate.

S.K. SHAH, J.

sl.